

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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VONTEAK LEE ALEXANDER SR.,

Plaintiff,

v.

RICHARD W. LEUNG, *et al.*,

Defendants.

Case No. 2:18-cv-00702-RFB-GWF

ORDER

*Application to Proceed in Forma Pauperis
(ECF No. 11) and Screening of Complaint
(ECF No. 8)*

This matter is before the Court on Plaintiff's Motion for Leave to Proceed in *Forma Pauperis* (ECF No. 11) filed December 20, 2018, Motion for Purposed [sic] Service of Complaint and Summons Pursuant to 28 U.S.C. § 1915 (ECF No. 12), filed December 26, 2018 and Motion for an Extension of Time for Service (ECF No. 13), filed January 4, 2019.

BACKGROUND

On July 30, 2018, Plaintiff filed his Amended Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (ECF No. 8).¹ He brings this action alleging violations of his Fourth Amendment right to be free from unreasonable searches and seizures and Fifth Amendment violation of deprivation of property without due process of law. Specifically, Plaintiff alleges that seven Las Vegas Metropolitan Police Department ("LVMPD Defendants") officers and two security guards employed by the New Orleans Hotel and Casino ("security guard Defendants") acted in a concerted effort to unlawfully intruded into his password protected cell phone without a search warrant or

¹ Although Plaintiff titles this complaint "Amended Civil Rights Complaint Pursuant to 42 U.S.C. § 1983," it is actually Plaintiff's Second Amended Complaint.

1 probable cause. Plaintiff requests general damages in the amount of \$65,000 as well as punitive
 2 damages. *Id.* at 7. Plaintiff is currently detained pending trial in a related criminal matter.²

3 **DISCUSSION**

4 **I. Application to Proceed *In Forma Pauperis***

5 Plaintiff initially filed this action and paid the requisite \$400.00 filing fee. ECF No. 1-1.
 6 Plaintiff now claims he is indigent as a result of financial difficulties related to his current detention
 7 at the Nevada Southern Detention Center. Plaintiff attached a financial affidavit to his application
 8 and complaint as required by 28 U.S.C. §1915(a). Reviewing Plaintiff's financial affidavit
 9 pursuant to 28 U.S.C. §1915, the Court finds that Plaintiff is unable to pre-pay any additional filing
 10 fees. However, the initial \$400.00 pre-paid filing fee shall not be refunded. As a result, Plaintiff's
 11 request to proceed *in forma pauperis* is granted.

12 **II. Screening the Complaint**

13 Upon granting a request to proceed *in forma pauperis*, a court must additionally screen a
 14 complaint pursuant to 28 U.S.C. § 1915(e). Specifically, federal courts are given the authority to
 15 dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which
 16 relief may be granted or seeks monetary relief from a defendant/third party plaintiff who is immune
 17 from such relief. 28 U.S.C. § 1915(e)(2). A complaint, or portion thereof, should be dismissed
 18 for failure to state a claim upon which relief may be granted "if it appears beyond a doubt that the
 19 plaintiff can prove no set of facts in support of his claims that would entitle him to relief." *Buckey*
 20 *v. Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). A complaint may be dismissed as frivolous if
 21 it is premised on a nonexistent legal interest or delusional factual scenario. *Neitzke v. Williams*,
 22 490 U.S. 319, 327–28 (1989). Moreover, "a finding of factual frivolousness is appropriate when
 23 the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are
 24 judicially noticeable facts available to contradict them." *Denton v. Hernandez*, 504 U.S. 25, 33
 25 (1992). When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave
 26 to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face
 27

28 ² *USA v. Alexander*, Case No. 2:17-cr-00072-RFB.

1 of the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*,
 2 70 F.3d 1103, 1106 (9th Cir. 1995).

3 The Court shall liberally construe a complaint by a pro se litigant. *Eldridge v. Block*, 832
 4 F.2d 1132, 1137 (9th Cir. 2007). This is especially important for civil rights complaints. *Ferdik*
 5 *v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, a liberal construction may not be used
 6 to supply an essential element of the claim absent from the complaint. *Bruns v. Nat'l Credit Union*
 7 *Admin.*, 12 F.3d 1251, 1257 (9th Cir. 1997) (quoting *Ivey v. Board of Regents*, 673 F.2d 266, 268
 8 (9th Cir. 1982)).

9 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for
 10 failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is essentially
 11 a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723
 12 (9th Cir. 2000). A properly pled complaint must provide a “short and plain statement of the claim
 13 showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v.*
 14 *Twombly*, 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual
 15 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the
 16 elements of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Papasan v.*
 17 *Allain*, 478 U.S. 265, 286 (1986)). The court must accept as true all well-pled factual allegations
 18 contained in the complaint, but the same requirement does not apply to legal conclusions. *Iqbal*,
 19 129 S.Ct. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory
 20 allegations, do not suffice. *Id.* at 1949. Secondly, where the claims in the complaint have not
 21 crossed the line from plausible to conceivable, the complaint should be dismissed. *Twombly*, 550
 22 U.S. at 570.

23 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the
 24 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on
 25 legal conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or
 26 claims of infringement of a legal interest which clearly does not exist), as well as claims based on
 27 fanciful factual allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke v. Williams*, 490
 28 U.S. 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

1 **III. Instant Complaint**

2 Plaintiff's complaint seeks relief for alleged violations of his Fourth and Fifth Amendment
 3 rights. He alleges that the LVMPD Defendants, conspired, in their individual capacities, to lie,
 4 falsify text messages, seize photos, call log history, Facebook information and other privately held
 5 secured data without probable cause and without a search warrant. Plaintiff seeks compensatory
 6 damages and damages for pain and suffering. In *Heck v. Humphrey*, the Supreme Court held that
 7 a "state prisoner may not maintain a § 1983 claim for damages if a judgment in favor of plaintiff
 8 would necessarily imply the invalidity of his conviction or sentence." 512 U.S. 477, 480 (1994);
 9 see also *Clemons v. Williams*, 2016 WL 1238229, at *2 (D. Nev. Mar. 29, 2016). Accordingly,
 10 and under *Heck*, an action that challenges the validity of a plaintiff's criminal conviction or
 11 confinement is not cognizable unless the plaintiff can prove that his or her sentence has been
 12 reversed, expunged, declared invalid, or called into question by the issuance of a writ of habeas
 13 corpus. *Heck*, 512 U.S. at 486-87. A prisoner may challenge the validity of his arrest, prosecution
 14 and conviction by writ of habeas corpus. *Smithart v. Towery*, 79 F. 3d 951, 952 (9th Cir. 1996).
 15 Importantly, *Heck* "applies to pending criminal charges and to claims brought by federal
 16 prisoners." *Fjerstad v. Bach*, No. C08-0023-JCC-BAT, 2008 WL 4449921 at * 2 (W.D. Wash.
 17 Sept. 26, 2008).

18 **a. Plaintiff's Fourth Amendment Claims**

19 Plaintiff claims LVMPD Defendants violated his Fourth Amendment rights by unlawfully
 20 searching and seizing his personal cellphone without probable cause. Although unclear from
 21 Plaintiff's Amended Complaint, he appears to allude that his subsequent arrest, based on the
 22 information retrieved from his cell phone, was invalid. An individual defendant is not liable on a
 23 civil rights claim unless the facts establish that defendant's personal involvement in some
 24 constitutional deprivation, or a causal connection between the defendant's wrongful conduct and
 25 the alleged constitutional deprivation. *Van Snowden v. Cazares*, 2015 WL 12859714, at *8 (C.D.
 26 Cal. Aug. 21, 2015) (citing *Hansen v. Black*, 885 F. 2d 642, 646 (9th Cir. 1989)).

27 Plaintiff has failed to establish that his confinement has been reversed, expunged, declared
 28 invalid, or called into question by the issuance of a writ of habeas corpus. Nor does Plaintiff

1 actually that allege his arrest was unlawful as a result of the alleged wrongful conduct of the
 2 LVMPD Defendants. Therefore, Plaintiff does not provide a factual basis to determine whether
 3 his claims against the LVMPD Defendants are barred by *Heck*. The Court, therefore, dismisses
 4 Plaintiff's claims against the LVMPD Defendants, with leave to amend to allow Plaintiff to
 5 establish whether he claims his arrest was unlawful, and if so, whether his confinement has been
 6 reversed, expunged, declared invalid, or called into question by the issuance of a writ of habeas
 7 corpus.³

8 **b. Plaintiff's Fifth Amendment Claims**

9 Plaintiff alleges the LVMPD Defendants violated his Fifth Amendment rights by seizing
 10 his cell phone and depriving him of his property without due process of law. "The Fifth
 11 Amendment to the United States Constitution guarantees that no one will be deprived of property
 12 without 'due process of law.'" *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995). However,
 13 this clause applies only to actors in the federal government. *See Bingue v. Prunchak*, 512 F.3d
 14 1169, 1174 (9th Cir. 2008); *see also Mihalovic v. Weiss*, No. 1:10-cv-1061 AWI GSA, 2011 WL
 15 2414426, at *3 (E.D. Cal. June 10, 2011)). Since Plaintiff alleges that the LVMPD Defendants
 16 were officers who worked for the Las Vegas Metropolitan Police Department, i.e., state
 17 employees, he has not plead a Fifth Amendment claim upon which relief can be granted.⁴ The
 18 Court, therefore dismisses Plaintiff's Fifth Amendment claim, with leave to amend.

19 **c. Plaintiff's Claims Against the New Orleans Security Guards**

20 Plaintiff alleges that the security guard Defendants, employed by the New Orleans Hotel and
 21 Casino violated his Fourth and Fifth Amendment rights. §1983 does not reach private conduct,
 22 regardless of how wrongful it may be. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).
 23 Only where "there is a sufficiently close nexus between the State and the challenged action of the
 24 regulated entity" will the Court allow a defendant to be subjected to a §1983 claim. *Id.* A "close
 25 nexus" exists only where the State has "exercised coercive power or has provided such significant

26 ³ Plaintiff must first challenge his alleged unlawful arrest and subsequent illegal confinement in an action under 28
 27 U.S.C. § 2255 (if he has since been convicted) or 28 U.S.C. § 2441 (if he is still a pretrial detainee).

28 ⁴ Plaintiff's allegations against the detectives, and officers of the LVMPD, as state actors, would properly be styled as
 a § 1983 claim in violation of his Fourteenth Amendment right to due process.

1 encouragement.” *Id.*, see also *Flag Bros. Inc. v. Brooks*, 436 U.S. 149, 156 (1978). Plaintiff has
2 failed to establish a connection exists between the State of Nevada and the actions of the private
3 security guard Defendants. Therefore, Plaintiff’s Complaint against the security guard Defendants
4 should be dismissed, with prejudice.

5 In light of the Court’s ruling, Plaintiff’s Motion for Purposed [sic] Service of Complaint and
6 Summons Pursuant to 28 U.S.C. § 1915 (ECF No. 12), and Motion for an Extension of Time for
7 Service (ECF No. 13) are denied, without prejudice.

8 If Plaintiff elects to proceed in this action by filing a third amended complaint, he is
9 informed that the Court cannot refer to a prior pleading in order to make his third amended
10 complaint complete. Local Rule 15–1 requires that an amended complaint be complete in itself
11 without reference to any prior pleading. This is because, as a general rule, an amended complaint
12 supersedes the original complaint. See *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.1967). Once
13 Plaintiff files an amended complaint, the original pleading no longer serves any function in the
14 case. Therefore, in an amended complaint, as in an original complaint, each claim and the
15 involvement of each defendant must be sufficiently alleged. Accordingly,

16 **IT IS THEREFORE ORDERED** that Plaintiff’s Application to Proceed *in Forma*
17 *Pauperis* (ECF No. 11) is **granted**. Plaintiff shall not receive a refund of the initial filing fee
18 previously paid, pursuant to 28 U.S.C. § 1915(b)(2).

19 **IT IS FURTHER ORDERED** that the movant herein is permitted to maintain this action
20 to conclusion without the necessity of prepayment of any additional fees or costs or the giving of
21 security therefor. This Order granting *forma pauperis* status shall not extend to the issuance of
22 subpoenas at government expense.

23 **IT IS FURTHER ORDERED** that, the Clerk shall also send a copy of this Order to the
24 attention of the Chief of Inmate Services for the Nevada Department of Corrections, P.O. Box
25 7011, Carson City, NV 89702.

26 **IT IS FURTHER ORDERED** that Plaintiff’s claims against Defendants Leung, Buford,
27 Julo, Gorski, Peck, Caine, and Pates, in their individual capacity, are dismissed without prejudice
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1 with leave to amend. Plaintiff shall have until **March 4, 2019** to file an amended complaint which
 2 corrects the noted deficiencies.

3 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Purposed [sic] Service of
 4 Complaint and Summons Pursuant to 28 U.S.C. § 1915 (ECF No. 12), and Motion for an Extension
 5 of Time for Service (ECF No. 13) are **denied**, without prejudice.

6 **RECOMMENDATION**

7 **IT IS HEREBY RECOMMENDED** that Plaintiff's claims against New Orleans Security
 8 Guards, Doe 1 and Doe 2, be dismissed with prejudice due to Plaintiff's failure to state a claim for
 9 which relief can be granted.

10 **NOTICE**

11 Under Local Rule IB 3-2, any objection to this Finding and Recommendation must be in
 12 writing and filed with the Clerk of the Court within **fourteen (14) days**. Appeals may be waived
 13 due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142
 14 (1985). Failure to file objections within the specified time or failure to properly address and brief
 15 the objectionable issues waives the right to appeal the District Court's order and/or
 16 appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157
 17 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

18 DATED this 11th day of February, 2019.

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21 GEORGE FOLEY, JR.
 22 UNITED STATES MAGISTRATE JUDGE
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